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INVALID HARMS: IMPROPER USE OF THE ADMINISTRATIVE PROCEDURE ACT’S GOOD CAUSE EXEMPTION

Miriam R. Stiefel*

Abstract: On October 13, 2017, the U.S. Department of Health & Human Services, U.S. Department of Treasury, and U.S. Department of Labor published two nearly identical interim final rules in the Federal Register. To do so, the agencies invoked the Administrative Procedure Act’s good cause exemption, permitting the rules to bypass prepromulgation notice and comment rulemaking requirements. The interim final rules allowed employers and insurers that provide group healthcare coverage under the Affordable Care Act to seek constitutional and moral exemptions—specifically for contraceptives and other preventive health services coverage. Using the two 2017 interim final rules as an illustration, this Comment considers whether constitutional and moral objections should qualify as valid reasons for administrative agencies to invoke the Administrative Procedure Act’s good cause exemption, ultimately arguing they should not. If valid, this use of constitutional and moral objections would broaden administrative agencies’ ability to bypass notice and comment rulemaking procedures, thereby delegitimizing the rulemaking processes and undercutting opportunities for public participation.

INTRODUCTION

The Administrative Procedure Act¹ (APA) governs how federal administrative agencies promulgate rules.² Generally, to promulgate rules, administrative agencies must comply with the APA’s public disclosure and participation requirements referred to as “notice and comment rulemaking.”³ Recognizing that notice and comment rulemaking could take months or years to complete, Congress established the good cause exemption,⁴ permitting agencies to bypass the notice and comment

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1. 5 U.S.C. § 553 (2018).

2. *Id.*

3. *Id.*

4. For example, the “‘interpretive rule’ exception allows agencies to skip notice and comment when the rule to be promulgated merely clarifies or explains an existing statute or rule.” Kristin E. Hickman & Mark Thomson, *Open Minds and Harmless Errors: Judicial Review of Postpromulgation Notice and Comment*, 101 CORNELL L. REV. 261, 264 (2016). There are additional exemptions concerning military action, foreign affairs, internal agency procedures, and general statements of policies. 5 U.S.C. § 553(a)(1)–(2).

procedures. The APA's good cause exemption permits agencies to quickly enact regulations in emergency situations,⁵ while protecting the public from agency abuse of this speedy option.⁶ Essentially, Congress established the APA's good cause exemption to act as an emergency exit door—to be used sparingly and under special circumstances.⁷

Under the Donald J. Trump Administration, on October 13, 2017, the U.S. Department of Health and Human Services (HHS), in collaboration with the U.S. Department of Treasury (Treasury) and the U.S. Department of Labor (DOL), introduced two nearly identical interim final rules (IFRs): the "Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act"⁸ (2017 Religious IFR) and the "Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act"⁹ (2017 Moral IFR). The IFRs established exemptions for employers and insurers with religious and moral objections from the Patient Protection and Affordable Care Act's (ACA) contraceptive coverage requirement.¹⁰

After their introduction, many states and nonprofit organizations filed lawsuits challenging the IFRs' legality under the U.S. Constitution and APA.¹¹ On November 15, 2018, the agencies issued two Final Rules (FRs), solidifying the 2017 IFRs.¹² In December 2018¹³ and January 2019,¹⁴ federal courts granted complaining states injunctive relief, finding that both the IFRs' and FRs' harms outweighed their benefits and that the rules were contrary to the ACA. Accordingly, the rules are no longer in effect. Nonetheless, the process used by the agencies to create the rules raises questions about whether constitutional or moral harms are valid reasons to invoke the APA's good cause exemption.

5. See *infra* Part I.

6. See Hickman & Thomson, *supra* note 4, at 293; *infra* Part I.

7. See *infra* Part I.

8. Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,792 (Oct. 13, 2017) (codified at 26 C.F.R. pt. 54, 29 C.F.R. 2590, 45 C.F.R. 147) [hereinafter 2017 Religious IFR].

9. Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,838 (Oct. 13, 2017) (codified at 26 C.F.R. pt. 54, 29 C.F.R. 2590, 45 C.F.R. 147) [hereinafter 2017 Moral IFR].

10. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 2713, 124 Stat. 119, 131–32 (Mar. 23, 2010) (codified at 42 U.S.C. § 300gg-12 (2018)).

11. See *infra* Part II.

12. 2017 Religious IFR, *supra* note 8; 2017 Moral IFR, *supra* note 9.

13. *California v. Azar*, 911 F.3d 558, 570–71 (9th Cir. 2018).

14. *California v. HHS*, 351 F. Supp. 3d 1267 (N.D. Cal. 2019).

In deciding cases about the rules' legality, the courts never directly addressed whether litigants could successfully argue that constitutional or moral harms are valid reasons for invoking the APA's good cause exemption.¹⁵ In other words, there remains an open question: may administrative agencies rely on a constitutional issue, such as religious freedom, or a broad ethical issue, such as moralism, to invoke the good cause exemption? This Comment addresses that question.

Specifically, this Comment considers whether constitutional and moral objections should qualify as valid reasons for administrative agencies to invoke the APA's good cause exemption, ultimately arguing they should not.¹⁶ In considering these issues, Part I reviews the legislative history and intent behind the APA's good cause exemption, as well as judicial review of the good cause exemption. Part II discusses the ACA's contraceptive coverage requirement. It then explores subsequent litigation, legislation, and agency rulemaking that challenged the requirement—including *Burwell v. Hobby Lobby Stores*¹⁷ and the 2017 IFRs. Part III then uses the 2017 IFRs to illustrate how constitutional and moral objections are invalid rationales for invoking the good cause exemption. If broadened to permit constitutional and moral rationales, the good cause exemption would cease to be an emergency exit, thereby threatening to end the public's opportunity to participate in notice and comment rulemaking.

I. THE APA'S GOOD CAUSE EXEMPTION

As a participatory democracy, the U.S. government utilizes open forums and public participation in lawmaking.¹⁸ To legitimize these democratic values, Congress enacted the APA to govern federal

15. For example, instead of deciding whether constitutional or moral harms are invalid, the U.S. District Court for the Northern District of California balanced the plaintiff states' interests with those of employers and insurance companies. The court held that the balance favored the plaintiff states' interest "in ensuring that health plans cover contraceptive services with no cost-sharing, as provided for under the ACA." *Id.* at 1298. For additional information see *infra* Part II.

16. While this Comment acknowledges the many constitutional, statutory, and common law claims involved in the suits challenging the 2017 IFRs and 2018 FRs, it focuses on courts' treatment of the APA's good cause exemption for constitutional and moral harms.

17. 573 U.S. 682 (2014).

18. See WALTER J. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 4 (7th ed. 2007) ("The framers held a strong bias in favor of lawmaking by representative assemblies, and so they viewed Congress as the prime national policy maker.").

administrative agencies’¹⁹ formal and informal methods of rulemaking.²⁰ Pursuant to the APA, notice and comment procedures are an informal method of rulemaking that Congress enacted to safeguard public participation²¹ by providing interested parties the opportunity to weigh in on an agency’s prospective actions.²² “[B]y mandating ‘openness, explanation, and participatory democracy’ in the rulemaking process, these procedures assure the legitimacy of administrative norms.”²³

Agency action to solicit, review, and respond to public comments and questions serve Congress’s and the APA’s goals of transparency and public participation.²⁴ However, due to the multiple steps involved—drafting, reviewing, providing notice, commenting, and responding to comments—notice and comment rulemaking is often a time-consuming and cumbersome process.²⁵ It may take months or years from the time an agency provides notice of its intended rule to the time it responds to comments in a final, published rule.²⁶

Recognizing that administrative rulemaking could be a lengthy process, Congress established the good cause exemption,²⁷ permitting agencies to bypass the public disclosure and participation requirements of notice and comment in certain circumstances. The APA’s good cause

19. It is part of the President’s duty to “take care that the laws be faithfully executed.” U.S. CONST. art. II, § 3. To carry out this duty, Presidents have exerted control over administrative agencies, like HHS, and those agencies’ regulatory decisions. Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683, 688–89 (2016). The APA governs how administrative agencies may enact regulations. See 5 U.S.C. § 553 (2018).

20. Juan J. Lavilla, *The Good Cause Exemption to Notice and Comment Rulemaking Requirements Under the Administrative Procedure Act*, 3 ADMIN. L.J. 317, 320–21 (1989). Federalregister.gov is the primary platform facilitating public participation in agency rulemaking. *About This Site*, FED. REG., <https://www.federalregister.gov/reader-aids/government-policy-and-ofr-procedures/about-this-site> [<https://perma.cc/XHD6-45BQ>]. On this website, interested parties may review proposed and final agency actions, as well as submit comments and questions about proposed agency action. See FED. REG., <https://www.federalregister.gov/> [<https://perma.cc/DVK7-RYLD>]. In certain instances, the APA requires agencies to publish responses to submitted comments in the final rule. 5 U.S.C. § 553.

21. 5 U.S.C. § 553.

22. *Id.* § 553(c); see also *Air Transp. Ass’n of Am. v. Dep’t of Transp.*, 900 F.2d 369, 375 (D.C. Cir. 1990) (discussing Congress’s intent that the APA provide interested parties the ability to be heard by agencies), *vacated on other grounds*, 933 F.2d 1043 (D.C. Cir. 1991).

23. *Air Transp. Ass’n*, 900 F.2d at 375 (citing *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1027 (D.C. Cir. 1978)).

24. See 5 U.S.C. § 553.

25. See *Reg Map*, U.S. GEN. SERVS. ADMIN., <https://reginfo.gov/public/reginfo/Regmap/index.jsp> [<https://perma.cc/SLNW-CDWM>].

26. Hickman & Thomson, *supra* note 4, at 291.

27. *Supra* note 4.

exemption²⁸ states that an agency is excused from notice and comment rulemaking “when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.”²⁹

This Part focuses on the good cause exemption. It discusses the procedural steps agencies must take to invoke the good cause exemption and issue a rule, as well as the elements required to justify a rule. This Part then proceeds to explore the good cause exemption’s legislative history and intent, utilization by agencies, and judicial review.

A. *Legislative History and Intent*

When Congress enacted the APA in 1946,³⁰ it clarified the good cause exemption requirements to ensure the exemption would not be used as a political lever.³¹ Court interpretations of Congressional intent explain that Congress designed the good cause exemption to be used in “situations of *emergency or necessity*,” as opposed to being used as “an ‘escape clause’ in the sense that any agency has discretion to disregard its terms or the facts. A true and supported or supportable finding of necessity or emergency must be made and published.”³² Thus, Congress enacted the good cause exemption “to accommodate situations where the policies promoted by public participation in rulemaking are outweighed by the countervailing considerations of effectiveness, efficiency, expedition, and reduction in expense, while assuring that agency decisions are based on facts.”³³ Accordingly, administrative agencies are only to use the good cause exemption as an emergency exit door.

Agencies invoking the good cause exemption tend to classify regulations published in the Federal Register as “interim final rules” or “final rules.”³⁴ IFRs are “interim” because they announce an agency’s intention to publish a revised and final rule later.³⁵ These rules are also “final” because they “take effect immediately upon publication or shortly

28. *Id.* at 264.

29. 5 U.S.C. § 553(b)(3)(B).

30. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946).

31. Anne J. O’Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 910–11 (2008).

32. *N.J. Dep’t of Env’tl. Prot. v. EPA*, 626 F.2d 1038, 1046 (D.C. Cir. 1980) (citing S. DOC. NO. 79-248, at 200 (1946)).

33. Lavilla, *supra* note 20, at 320–21.

34. O’Connell, *supra* note 31, at 903.

35. *Id.*

thereafter,” superseding a comment period.³⁶ In other words, once an IFR is published, the agency invites comments³⁷ and “indicat[es] that it *may* revise the rule in the future based on the comments it receives—thus leading to the label of an ‘interim-final’ rule.”³⁸ A revised IFR is labeled as a “final rule” (FR).³⁹ If a FR is not promulgated, an IFR may be relied on, essentially acting as a final rule.⁴⁰ Alternatively, an IFR may include a sunset date by which it will lapse.⁴¹ Although the APA does not mandate that rules justified by the good cause exemption be interim, many are.⁴² Because IFRs are required to engage in a postpromulgation notice and comment period, IFRs face less scrutiny than FRs, which become final regardless of a participatory period.⁴³ Agencies typically justify publishing IFRs by using the good cause exemption.⁴⁴

The good cause exemption is touted for its flexibility but also criticized as a loophole.⁴⁵ “There is a general public reluctance to permit an agency acting under a delegated authority to abandon the extensive checks on agency power” created by the APA.⁴⁶

When agencies limit affected persons’ ability to prepare for a new rule—e.g., by promulgating an IFR—this reluctance is heightened.⁴⁷ Skeptics of the good cause exemption argue that “it is hard to see why an agency would ever go to the trouble of undertaking prepromulgation notice and comment when it could more easily promulgate an interim-final rule now and then undertake postpromulgation notice and comment more or less at its leisure.”⁴⁸

36. *Id.*

37. This Comment refers to the procedures before an IFR is published as a prepromulgation notice and comment period, and the procedures after an IFR is published as a postpromulgation notice and comment period.

38. Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 ADMIN. L. REV. 731, 748 (1999) (emphasis added).

39. O’Connell, *supra* note 31, at 901–02.

40. *Id.* at 903.

41. Asimow, *supra* note 38, at 731 n.104.

42. 5 U.S.C. § 553 (2018); *see also* O’Connell, *supra* note 31, at 948.

43. O’Connell, *supra* note 31, at 902–03.

44. *Id.* at 948.

45. Lavilla, *supra* note 20, at 322 (citing K. WARREN, ADMINISTRATIVE LAW IN THE AMERICAN POLITICAL SYSTEM 280–94 (2d ed. 1988)).

46. Babette E.L. Boliek, *Agencies in Crisis? An Examination of State and Federal Agency Emergency Powers*, 81 FORDHAM L. REV. 3339, 3341 (2013).

47. *United States v. Gavrilovic*, 551 F.2d 1099, 1105 (1977).

48. Hickman & Thomson, *supra* note 4, at 293. Courts, agencies, and scholars use the terms postpromulgation or post-hoc to refer to comment periods that occur after an interim final rule is published in the Federal Register, as opposed to prepromulgation comments as part of “normal” notice

Administrative law scholar and University of Minnesota Professor of Law, Kristin Hickman, illustrates agency-specific abuse of the good cause exemption through Treasury's rulemaking history.⁴⁹ Hickman reported the following:

Treasury and the IRS typically put a lot more effort into temporary Treasury regulations than proposed ones, for the simple reason that temporary regulations are legally binding and proposed ones are not. If agencies are less likely to take seriously postpromulgation comments than they are prepromulgation comments, it is hard to argue convincingly that postpromulgation notice and comment are a meaningful substitute for prepromulgation notice and comment.⁵⁰

Treasury's pattern of issuing binding, yet "temporary," regulations demonstrates how agencies circumvent the checks and balances put in place to prevent abuse: namely, prepromulgation notice and comment.⁵¹ As Pepperdine University School of Law Professor Babette E.L. Boliek notes, "statutory language and structure of the 'good cause' exemption is so broad, and effective review of agency action so low, [] agency accountability and transparency are sacrificed."⁵² The lack of accountability and transparency leaves agency rulemaking open to potential abuse of the good cause exemption.

In the 1950s, some members of Congress sought "to limit the use of the good cause exemption in rulemaking to cases where 'immediate adoption of the rule [was] necessary for the preservation of the public health, safety, or *morals*.'"⁵³ However, the word "moral"⁵⁴ was excluded from the APA's amendments.⁵⁵ Practicing administrative law attorney and Universidad Pontificia Comillas Professor Juan J. Lavilla explains Congress may have excluded the word because "'morals' expresses a value-laden concept lending itself to subjective interpretations," and "the adoption of this proposal would not improve the exemption."⁵⁶ So while one Congress

and comment rulemaking. *Id.* at 263 nn.5–6, 273 (citing N.J. Dep't of Env'tl. Prot. v. EPA, 626 F.2d 1038, 1049–50 (D.C. Cir. 1980)).

49. *Id.*

50. *Id.*

51. *Id.*

52. Boliek, *supra* note 46, at 3343–44.

53. See Lavilla, *supra* note 20, at 324 (emphasis added) (citing S. DOC. 91-49, at 365 (1969)).

54. Throughout this Comment the Author uses the terms "moral" and "morals" interchangeably when referring to the statutory and legislative history of the APA.

55. See 5 U.S.C. § 553(b)(3)(B) (2018).

56. See Lavilla, *supra* note 20, at 324 n.29.

member mentioned the word “morals” in discussions regarding amending § 553,⁵⁷ the term moral was excluded from the Act.

In addition to the APA, Congress further expressed its intent for agencies to engage in notice and comment rulemaking through the promulgation of agency-specific statutes.⁵⁸ Some agency-specific statutes explicitly cite § 553’s notice and comment rulemaking requirements.⁵⁹ While other agency-specific statutes do not explicitly cite the APA, they utilize the same notice and comment requirements.⁶⁰ As long as agencies meet their respective agency-specific statutory requirements and comply with the APA, they may establish internal guidelines and procedures for informal rulemaking and the use of the good cause exemption.⁶¹ Essentially, these procedures act as a guide and limit agency rulemaking.⁶² Both Congress’s agency-specific statutes and agencies’ internal procedures bolster the APA’s requirements and their credibility. When neither Congress nor an agency has created additional statutes or procedures governing the use of the good cause exemption, agencies default to the APA’s rules.⁶³

B. An Agency’s Choice: Invoking the Good Cause Exemption

Agencies invoke the good cause exemption frequently. According to the Government Accountability Office, “between 2003 and 2010 federal

57. *Id.* at 324–25.

58. *See supra* notes 55–57. For example, the Federal Communications Commission (FCC) is required to provide notice and comment for any rule revisions to comply with its 1992 equal employment opportunity provisions. 47 U.S.C. § 554(d)(1) (2018). The Federal Aviation Administration is required to engage in notice and comment rulemaking before amending “air tour management plan[s]” so that planes may fly over national parks and tribal lands. 49 U.S.C. § 40128(b)(4)–(6) (2018). And, the Environmental Protection Agency (EPA) is required to engage in notice and comment rulemaking when modifying fuel regulations. 42 U.S.C. § 7545 (2018).

59. For example, the U.S. Department of Agriculture is required to abide by § 553 when consolidating or reforming milk marketing orders. 7 U.S.C. § 7253(b)(1) (2018).

60. For example, HHS is required to hold a “public notice and comment period” before it modifies certain categories and classes of prescription drug coverage. 43 U.S.C. § 1395w-104(b)(3)(G)(iii) (2018).

61. For example, “the DEA has defined good cause in terms of whether ‘the conditions of public health or safety *necessitate* an earlier effective date.’” *United States v. Gavrilovic*, 551 F.2d 1099, 1104 (8th Cir. 1977) (emphasis in original). Also of note, courts typically afford agency guidelines and manuals some level of deference. *See, e.g.*, *United States v. Mead Corp.*, 533 U.S. 218 (2001) (deferring to guidelines that an agency created without engaging in notice and comment rulemaking); *Mistretta v. United States*, 488 U.S. 361 (1989) (finding that a congressional statute granted an agency discretion to formulate guidelines).

62. *N.J. Dep’t of Env’tl. Prot. v. EPA*, 626 F.2d 1038, 1046 (D.C. Cir. 1980) (citing S. Doc. NO. 79-248 (1946)).

63. *California v. HHS*, 281 F.3d 806, 832 (N.D. Cal. 2017).

agencies issued about 35% of major rules and about 44% of nonmajor rules without a notice of proposed rulemaking.”⁶⁴ Of the rules promulgated without a notice of proposed rulemaking, “77% of major rules and 61% of nonmajor rules” invoked the good cause exemption.⁶⁵ Therefore, this emergency exit is starting to look like the main exit.

There are numerous reasons an agency may invoke the good cause exemption. Stanford University Administrative Law Professor Anne Joseph O’Connell notes “[a]n agency’s choice of rulemaking process . . . is strategic.”⁶⁶ The traditional notice and comment rulemaking process is often a long, drawn out, and costly process for agencies, especially during times of political divisiveness, when government agencies and political actors cannot easily come to a consensus about a rule.⁶⁷ Thus, the good cause exemption provides agencies the flexibility to react quickly to emergencies or avoid political conflict, while assuring the public some level of postpromulgation review.⁶⁸ However, Congress did not establish the good cause exemption for agencies to evade political scrutiny.⁶⁹ Courts will invalidate IFRs when an agency clearly intended to avoid “high conflict public comment periods.”⁷⁰ In other words, agencies may not avoid notice and comment procedures strictly for political reasons.

Another prevalent reason agencies invoke the good cause exemption is compliance with immediate legislative (i.e., statutory) deadlines and court

64. JARED P. COLE, CONG. RESEARCH SERV., R44356, THE GOOD CAUSE EXCEPTION TO NOTICE AND COMMENT RULEMAKING: JUDICIAL REVIEW OF AGENCY ACTION 1, 1 n.2 (2016), <https://fas.org/sgp/crs/misc/R44356.pdf> [<https://perma.cc/GV5F-LWYR>] (The GAO report adopted the definition of major rules in the Congressional Review Act, which distinguishes between major rules and nonmajor rules. Major rules are those determined by the office of Information and Regulatory Affairs (OIRA) to, among other things, have or be likely to have an annual effect on the economy of \$100 million or more. 5 U.S.C. § 804(2) (2018)) (citing U.S. GOV’T ACCOUNTABILITY OFF., GAO-13-21, FEDERAL RULEMAKING: AGENCIES COULD TAKE ADDITIONAL STEPS TO RESPOND TO PUBLIC COMMENTS (2012), <https://www.gao.gov/assets/660/651052.pdf> [<https://perma.cc/VX4U-4E67>])).

65. *Id.* at 1 n.3. In a study of the 4,658 final regulatory actions published in the Federal Register in 1997, about half were published without a notice of proposed rulemaking. U.S. GEN. ACCOUNTING OFF., GAO/GGD-98-126, FEDERAL RULEMAKING: AGENCIES OFTEN PUBLISH FINAL ACTIONS WITHOUT PROPOSED RULES 2 (1998), <https://www.gao.gov/assets/230/226214.pdf> [<https://perma.cc/LN6S-YYFM>].

66. O’Connell, *supra* note 31, at 917.

67. *Id.*

68. Hickman & Thomson, *supra* note 4, at 291.

69. O’Connell, *supra* note 31, at 918.

70. *Id.*

orders.⁷¹ For example, at issue in *Omnipoint Corp. v. FCC*⁷² was the agency's published "propos[al] to eliminate all race- and gender-based provisions" of an existing rule for broadband wireless internet licenses.⁷³ While the FCC had not been ordered by a court or Congress to do so, it proposed this rule to avoid constitutional challenges in the wake of the U.S. Supreme Court's decision in *Adarand Constructors v. Peña*,⁷⁴ which held "strict scrutiny must be applied to all racially based government actions . . . [and] such actions 'are constitutional only if they are narrowly tailored measures that further compelling governmental interests.'"⁷⁵ The FCC's regulations withstood challenges for lack of good cause, not on constitutional grounds, but because the FCC "was under a congressional deadline to act quickly"⁷⁶ and a delay "would undermine the public interest by delaying additional competition in the wireless marketplace."⁷⁷ Since the constitutional issues were litigated and decided in *Adarand*, the FCC had no reason to implicate the Fourteenth Amendment of the U.S. Constitution in its statement of reasons for issuing the rule.⁷⁸ Instead, the FCC merely had to describe the litigation and time delay as a reason for issuing its rule.⁷⁹ Together, these descriptions were enough for the FCC to establish a valid use of the good cause exemption.

Additional reasons agencies invoke the good cause exemption tend to track Congressional intent: in response to emergency situations,⁸⁰ to create interpretative rules rather than substantive or generally applicable

71. See generally *EME Homer City Generation, L.P. v. EPA*, 795 F.3d 118 (D.C. Cir. 2015) (holding that the EPA validly invoked good cause exemption after litigation on the matter because public comment would not have provided new information); *Omnipoint Corp. v. FCC*, 78 F.3d 620, 630 (D.C. Cir. 1996) (holding that the FCC validly invoked good cause to comply with a "congressional deadline to act quickly"); *United Techs. Corp. v. EPA*, 821 F.2d 714 (D.C. Cir. 1987) (holding that the EPA validly invoked good cause to comply with statutory amendments); *Am. Fed'n of Gov't Emps. v. Block*, 655 F.2d 1153 (D.C. Cir. 1981) (holding that while the USDA validly invoked good cause to comply with a court order and prevent public concern, the USDA did not have good cause to make the rule permanent).

72. 78 F.3d 620 (D.C. Cir. 1996).

73. *Id.* at 627.

74. 515 U.S. 200 (1995).

75. *Omnipoint Corp.*, 78 F.3d at 627 (citing *Adarand*, 515 U.S. at 227).

76. *Id.* at 630.

77. *Id.*

78. *Id.*

79. *Id.* at 636.

80. See, e.g., *Util. Solid Waste Activities Grp. v. EPA*, 236 F.3d 749 (D.C. Cir. 2001) (holding that there was no statutorily-imposed emergent situation or another emergency present where the EPA relied on an emergent situation claim).

rules;⁸¹ and to promulgate internal agency regulations.⁸² As discussed further in Section I.C, an agency cannot shield its rule from judicial review by invoking any of the aforementioned good cause rationales.

Procedurally, when an agency invokes the good cause exemption and issues a rule, it must provide “finding[s] and a brief statement of reasons” justifying its use.⁸³ In *United States v. Dean*,⁸⁴ the Eleventh Circuit upheld the Attorney General’s use of the good cause exemption because the Attorney General published its rule with an adequate statement of reasons.⁸⁵ The statement of reasons provided guidance to “eliminate any possible uncertainty about the applicability of” the Sex Offender Registration and Notification Act.⁸⁶ The Eleventh Circuit also held that the Attorney General had properly invoked the good cause exemption because its use avoided the potential procedural delay of reregistering sex offenders during a notice and comment period, which could “do real harm” to the public.⁸⁷

In the absence of either findings or a statement of reasons, courts will invalidate a rule on procedural grounds without considering the merit of the agency’s good cause exemption. Likewise, courts will invalidate a rule if the substance of its findings or statement of reasons is inadequate. *Tennessee Gas Pipeline Co. v. FERC*⁸⁸ illustrates courts’ unwillingness to uphold IFRs without proper findings and statements of reasons.⁸⁹ In *Tennessee Gas*, the D.C. Circuit found the agency’s statement of evidence and reasoning for implementing the good cause exemption insufficient because it did not provide data, facts, or examples to support its reasoning.⁹⁰

Anytime an agency relies on the good cause exemption, it runs the risk that a court may invalidate the regulation on either procedural or

81. See, e.g., *Elec. Privacy Info. Ctr. v. U.S. Dep’t of Homeland Sec.*, 653 F.3d 1, 5 (D.C. Cir. 2011) (holding that the TSA’s procedural changes were actually legislative and thus subject to notice and comment); *United States v. Picciotto*, 875 F.2d 345 (D.C. Cir. 1989) (holding that a U.S. Park Service rule was invalid because it was substantive rather than interpretive).

82. See, e.g., *Chamber of Commerce v. SEC*, 443 F.3d 890 (D.C. Cir. 2006) (holding that the SEC did not satisfy good cause exception when it promulgated a rule in anticipation of management changes).

83. 5 U.S.C. § 553(b)(3)(B) (2018).

84. 604 F.3d 1275 (11th Cir. 2010).

85. *Id.* at 1277.

86. *Id.*

87. *Id.* at 1281 (citing *U.S. Steel Corp. v. EPA*, 595 F.2d 207, 214 (5th Cir. 1979)).

88. 969 F.2d 1141 (D.C. Cir. 1992).

89. *Id.*

90. *Id.* at 1145–46.

substantive grounds.⁹¹ Because the aforementioned rationales—statutory deadlines, court orders, emergency situations, interpretive regulations, and internal agency operations—have, at times, passed judicial muster,⁹² it is uncommon to find agency rules invoking good cause for any other reason.

C. *Judicial Review of Good Cause*

For courts to hold that an agency validly relied on the good cause exemption to promulgate an IFR, they must determine that § 553's notice and comment requirements were "impracticable, unnecessary, or contrary to public interest."⁹³ As discussed above, agencies' use of the good cause exemption can be improper on procedural or substantive grounds. For example, a rule relying on the good cause exemption may be procedurally invalid because it was not "impracticable, unnecessary, or contrary to public interest" for the agency to go through notice and comment procedures.⁹⁴ A rule relying on good cause may be substantively invalid because the agency failed to properly explain the harm it relied upon in its notice.⁹⁵ If a court invalidates an agency's rule for failing to follow proper procedures, there is no need to continue analyzing the rule—it is per se invalid.⁹⁶ If an agency follows the correct procedures, a court will consider

91. See Section I.C for further discussion of judicial review of good cause exemptions.

92. See *supra* notes 71 & 80–82.

93. 5 U.S.C. § 553(b)(3)(B) (2018).

94. *Id.*

95. Hickman & Thomson, *supra* note 4, at 317 ("[W]hen it appears that an agency haphazardly or pretextually claimed any of the statutory exemptions from notice-and-comment rulemaking requirements in an effort to either avoid bureaucratic hassle or expedite the agency's policy preferences, a court could justifiably infer that the agency was unlikely to have taken postpromulgation public input seriously. Correspondingly, courts should also consider the time the agency spent considering comments before promulgating the rule in final form.") (citing *Advocates for Highway & Auto Safety v. Fed. Highway Admin.*, 28 F.3d 1288, 1292 (D.C. Cir. 1994)).

96. In *Encino Motorcars, LLC v. Navarro*, 579 U.S. ___, 136 S. Ct. 2117 (2016), employees with the position of "service advisors" alleged that their automobile-employer violated the Fair Labor Standards Act's (FLSA) overtime payment provision. *Id.* at 2120. In 2010, the U.S. Department of Labor (DOL) published an interpretation of the FLSA's provision by defining "salesman." *Id.* The Court considered whether DOL adequately explained its reasoning for considering certain comments persuasive when it issued the 2011 rule. *Id.* at 2120, 2127. The Court held that DOL failed to meet its procedural requirements, so the rule's definitions would not be afforded *Chevron* deference. *Id.* at 2126–27. Because the lower courts relied on the definitions from a procedurally flawed rule—and in doing so the lower court improperly provided DOL with *Chevron* deference—the Court vacated the lower court's judgment and remanded the case. *Id.* By 2018, *Encino Motorcars* had made its way back to the Court to determine whether, without regard to administrative deference, the term "salesman" encompasses the term "service advisors." 584 U.S. ___, 138 S. Ct. 1134, 1139 (2018). The Court found that it did. *Id.*

whether or not to afford that agency's rule some level of deference.⁹⁷ This Section broadly discusses the tools courts use to review agency decisions, as well as the factors courts consider when reviewing good cause exemptions.

1. Standard of Review for Good Cause

When drafting the APA, the Senate Committee on the Judiciary imposed upon the courts the duty of preventing agencies from using the good cause exemption as a tool for avoiding the APA's rulemaking requirements.⁹⁸ To survive judicial scrutiny, the "[c]ause found must be real and demonstrable."⁹⁹ To determine whether the cause relied upon is real and demonstrable, courts consider whether an agency "provide[d] the requisite specific and particularized explanation that the courts require to substantiate a valid good cause claim."¹⁰⁰ As briefly discussed in Section I.B, "courts tend to be skeptical of generic assertions of a need for immediate guidance" or regulation absent notice and comment.¹⁰¹ For that reason, "courts generally limit the scope of the [good cause] exception to truly unusual circumstances, such as when public safety is threatened or advance notice of a rule might undermine its application."¹⁰² That being said, courts' consideration of whether an agency "properly invoked 'good cause' proceeds case-by-case, sensitive to the totality of the factors at play."¹⁰³

Courts generally review agencies' good cause actions de novo or with a mix of de novo and arbitrary and capricious review.¹⁰⁴ Pursuant to § 706 of the APA,¹⁰⁵ courts review agencies' good cause actions de novo in at least three instances: (1) when agency decisions involve constitutional

97. *Id.*

98. *N.J. Dep't of Env'tl. Prot. v. EPA*, 626 F.2d 1038, 1046 (D.C. Cir. 1980) (citing S. REP. NO. 79-752, at 31 (1945)).

99. *Id.*

100. Kristin E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465, 532 (2013).

101. *Id.*

102. *Id.*

103. *Alcaraz v. Block*, 746 F.2d 593, 612 (9th Cir. 1984) (citing *Petry v. Block*, 737 F.2d 1193, 1200 (D.C. Cir. 1984)).

104. *United States v. Reynolds*, 710 F.3d 498, 506–09 (3d Cir. 2013).

105. 5 U.S.C. § 706(2)(F) (2018).

matters;¹⁰⁶ (2) when agency decisions interpret judicial opinions;¹⁰⁷ and (3) when agency decisions implicate rulemaking procedures.¹⁰⁸ De novo review may overlap with arbitrary and capricious review when there are claims of procedural deficiencies.¹⁰⁹ In fact, § 706 explicitly provides that courts should “hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”¹¹⁰

Courts may use § 706(2)(A)’s arbitrary and capricious standard as a fallback when they find that the agency’s reasoning conflicts with statutory intent or the agency fails to provide any reasoning at all.¹¹¹ For example, in *Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Automobile Insurance Co.*,¹¹² the National Highway Traffic Safety Administration revoked a seatbelt regulation.¹¹³ The Court, using arbitrary and capricious review, found that the agency’s rescission of the seatbelt regulation conflicted with the National Traffic and Motor Vehicle Safety Act’s intent to reduce traffic accidents and improve traffic standards,¹¹⁴ and the agency “failed to supply the requisite ‘reasoned analysis’” for the rescission.¹¹⁵ Therefore, the agency’s action was unlawful under the APA. The Court held the arbitrary and capricious standard to be the correct standard of review to determine whether (1) an agency’s decision to revoke a regulation conflicts with statutory intent and (2) an agency provided reasoning for its actions.¹¹⁶

Because courts may review agencies’ use of the good cause exemption de novo or under arbitrary and capricious review, the circuits are split regarding whether some level of deference can be afforded to “an agency’s assertion of good cause under § 553(b)(B).”¹¹⁷ Under arbitrary

106. *Id.* § 706(2)(B); *see, e.g.*, *Gulf Power Co. v. FCC*, 208 F.3d 1263 (11th Cir. 2000) (considering the Fifth Amendment’s Takings Clause); *St. Francis Hosp. Ctr. v. Heckler*, 714 F.2d 872 (7th Cir. 1983) (considering the Fifth Amendment’s due process and equal protection clauses).

107. 5 U.S.C. § 706(2)(A), (C), (D).

108. *Id.* § 706(2)(D).

109. *See* *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 252 (1977).

110. 5 U.S.C. § 706(2).

111. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41 (1983) (citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 414 (1971)).

112. 463 U.S. 29 (1983).

113. *Id.* at 34, 41.

114. *Id.* at 48.

115. *Id.* at 57.

116. *Id.* at 33.

117. *United States v. Brewer*, 766 F.3d 884, 888, 890 (8th Cir. 2014) (holding that under de novo review and “even under an arbitrary and capricious standard of review, there is an insufficient

and capricious review, courts may afford an agency's procedures and decisions some level of deference,¹¹⁸ but courts may not under de novo review.¹¹⁹ While some courts have skirted this issue,¹²⁰ others have held that no deference should be afforded to agency good cause actions "although the [APA] itself presumes that review of agency action under arbitrary-and-capricious standard is 'highly deferential.'"¹²¹ Thus, it remains an open question whether courts could properly afford some level of deference to agency decisions to invoke the good cause exemption.¹²²

2. *Judicial Review of Constitutional Matters*

It is unusual for administrative agencies to enact IFRs solely on constitutional grounds, so there is little case law and literature analyzing judicial review of regulations invoking good cause for constitutional reasons. Therefore, it is beneficial to discuss how federal courts generally review constitutional matters.

Typically, the federal judiciary avoids deciding constitutional matters.¹²³ Traditional principles of separation of powers encourage the Judicial, Legislative, and Executive branches to stay in their lanes. Courts act strategically to stay in good standing with the legislature, executive, and public by avoiding hot-topic and value-laden issues, including constitutional issues.¹²⁴ Courts are encouraged to keep peace with the legislature because Congress has the power to confirm and impeach judges, as well as expand and constrict judicial power,¹²⁵ among other reasons.

showing of good cause for bypassing the APA's requirements of notice and comment and pre-enactment publication") (first citing *United States v. Gavrilovic*, 551 F.2d 1099, 1105 (8th Cir. 1977); then citing *United States v. Reynolds*, 710 F.3d 498, 506–07 (3d Cir. 2013)); GARY LAWSON, *FEDERAL ADMINISTRATIVE LAW* 458 (7th ed. 2016) (citing *Reynolds*, 710 F.3d at 507–09).

118. *Reynolds*, 710 F.3d at 508.

119. *Id.* at 506.

120. *Id.* at 508.

121. *Mid Continent Nail Corp. v. United States*, 846 F.3d 1364, 1372 (Fed. Cir. 2017) (first citing *Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 260 F.3d 1365, 1372 (Fed. Cir. 2001); then citing *Mobil Oil Corp. v. Dep't of Energy*, 728 F.2d 1477, 1486–87 (Temp. Emer. Ct. App. 1983)).

122. LAWSON, *supra* note 117, at 458 (first citing *Reynolds*, 710 F.3d at 507–09; then citing *Sorenson Commc'ns, Inc. v. FCC*, 755 F.3d 702, 707 (D.C. Cir. 2014)).

123. See Neal K. Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109, 2212, 2215 (2015); Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1202–08 (2006).

124. See *supra* note 123.

125. U.S. CONST. art. III, § 1.

Courts commonly employ the canon of constitutional avoidance to dodge deciding constitutional issues.¹²⁶ In other words, a court reviewing an agency regulation, invoked to remedy a constitutional harm, will likely attempt to decide the matter without reaching the constitutional question. To avoid the merits of a constitutional claim, a court may rule on procedural or statutory grounds.¹²⁷ The maneuver to avoid constitutional issues is a court's way of leaving through its own emergency exit door.

3. *Additional Judicial Considerations of Good Cause*

Courts consider numerous factors to decide whether agencies properly invoked the good cause exemption. For example, courts consider whether Congress enacted a statute that imposes additional restrictions on the use of the good cause exemption or provided an alternative rulemaking exemption.¹²⁸ If such a statute exists, courts may review its legislative history to understand Congress's intent.¹²⁹ Courts also consider whether agency-made guidelines impact rulemaking¹³⁰ and whether the administrative record "offer[s any] other indications of an agency's motives for foregoing prepromulgation notice and comment."¹³¹ Another consideration is whether the court would do more harm than good by invalidating the regulation.¹³²

When reviewing good cause actions, courts generally hold that "an administrative agency is required to balance the necessity for immediate implementation against principles of fundamental fairness"¹³³ regarding its impact on individuals. Courts also agree that "a balance . . . must be struck, even in time[s] of emergency, between regulatory efficiency and the procedural safeguards created to protect representative government, curb agency overreach, and promote agency transparency."¹³⁴

While the good cause exemption is "a flexible standard, . . . courts have said that it 'is to be narrowly construed and only reluctantly

126. See *supra* note 123.

127. See, e.g., *Fair Hous. Council of San Fernando Valley v. Roommate.com*, 666 F.3d 1216, 1222 (9th Cir. 2012) (quoting *INS v. St. Cyr*, 533 U.S. 289, 299–300 (2001)).

128. For discussions regarding congressional intent, see *United States v. Mead Corp.*, 533 U.S. 218, 236 (2001), and *Chevron, U.S.A., Inc. v. Nat. Res. Def. Counsel, Inc.*, 467 U.S. 837, 857 (1984).

129. See *Mead Corp.*, 533 U.S. at 236.

130. *California v. HHS*, 281 F.3d 806 (N.D. Cal. 2017).

131. *Hickman & Thomson*, *supra* note 4, at 317 (citing *Advocates for Highway & Auto Safety v. Fed. Highway Admin.*, 28 F.3d 1288, 1292 (D.C. Cir. 1994)).

132. *Hickman*, *supra* note 100, at 471.

133. *United States v. Gavrilovic*, 551 F.2d 1099, 1105 (8th Cir. 1977).

134. *Boliek*, *supra* note 46, at 3341.

countenanced,’ with its use ‘limited to emergency situations.’”¹³⁵ Yet, in *Dean*, the Eleventh Circuit held that to implicate the good cause exemption “there does not need to be an emergency situation . . . [T]he [agency] only has to show that there is good cause to believe that delay would do real harm.”¹³⁶

Courts recognize that agencies are “not likely to be receptive to suggested changes once the agency ‘put[s] its credibility on the line in the form of “final” rules. People naturally tend to be more close-minded and defensive once they have made a “final” determination.’”¹³⁷ In *New Jersey v. EPA*,¹³⁸ the D.C. Circuit noted that creating an opportunity for postpromulgation comment is an insufficient remedy for failing to follow notice and comment rulemaking procedures.¹³⁹ Therefore, agencies utilizing the good cause exemption and engaging in a postpromulgation comment period must demonstrate to courts that they are committed to keeping an open mind during the comment period and prior to enacting a final rule.¹⁴⁰

Courts have also addressed the question of whether statutory or court deadlines are sufficient reasons for invoking the good cause exemption.¹⁴¹ At issue in *Methodist Hospital of Sacramento v. Shalala*¹⁴² was whether statutorily imposed implementation deadlines justified HHS’s use of the APA’s good cause exemption.¹⁴³ The D.C. Circuit found the good cause exemption was justified because of the statute’s strict time constraints, noting that “[b]etween the April 20 enactment and the September 1 deadline, the Secretary faced the daunting task of preparing regulations to implement a complete and radical overhaul of the Medicare reimbursement system.”¹⁴⁴ Due to these time constraints, the court found

135. Nick Bagley, *The New Contraception Rule Is Procedurally Flawed*, TAKE CARE (June 1, 2017), <https://takecareblog.com/blog/the-new-contraception-rule-is-procedurally-flawed> [<https://perma.cc/JV7Z-7F7L>] (quoting *Util. Solid Waste Activities Grp. v. EPA*, 236 F.3d 749 (D.C. Cir. 2001)).

136. *United States v. Dean*, 604 F.3d 1275, 1281 (11th Cir. 2010) (narrowly interpreting the good cause exemption).

137. *Air Transp. Ass’n of Am. v. Dep’t of Transp.*, 900 F.2d 369, 379 (D.C. Cir. 1990), *vacated on other grounds*, 933 F.2d 1043 (D.C. Cir. 1991) (citations omitted).

138. 626 F.2d 1038 (D.C. Cir. 1980).

139. *Air Transp. Ass’n*, 900 F.2d at 1049.

140. *New Jersey*, 626 F.2d at 1042.

141. *Id.* (citing *U.S. Steel Corp. v. EPA*, 595 F.2d 207, 213 (5th Cir. 1979)).

142. 38 F.3d 1225 (D.C. Cir. 1994).

143. *Id.* at 1236.

144. *Id.* at 1237.

that the Secretary of HHS had not abused the good cause exemption.¹⁴⁵ However, in *U.S. Steel Corp. v. EPA*,¹⁴⁶ the Fifth Circuit held that “the mere existence of deadlines for agency action, whether set by statute or court order, does not in itself constitute good cause for a § 553(b)(B) exception.”¹⁴⁷ The EPA’s argument that complying with this particular congressionally imposed deadline constituted good cause for forgoing notice and comment did not persuade the court.¹⁴⁸ Thus, while the good cause exemption could be implicated when Congress creates a statute or a court order imposes a strict deadline for agency action, the mere existence of deadlines for agency action is not necessarily enough to constitute good cause.

Additionally, courts have held that the harm agencies claim in order to implicate the good cause exemption may not be overly general or broad.¹⁴⁹ In *Sorenson Communications, Inc. v. FCC*,¹⁵⁰ the D.C. Circuit, reviewing an FCC action de novo, held that the record was “too scant to establish a fiscal emergency” and that while “no particular catechism is necessary to establish good cause, something more than an unsupported assertion is required.”¹⁵¹ Therefore, to uphold the good cause exemption, courts must find the harm claimed by agencies to be demonstrable and immediate—like war, health crisis, or economic collapse.¹⁵²

While agencies may rely on the good cause exemption to address public health and welfare harms, courts must ensure those harms are immediate enough to warrant bypassing notice and comment procedures.¹⁵³ For example, in *Northwest Airlines, Inc. v. Goldschmidt*,¹⁵⁴ the Eighth Circuit upheld the use of the good cause exemption because the challenged rule generally addressed public concerns—the reservation of landing and takeoff times at airports.¹⁵⁵ But, in *United States Steel Corp.*, the Fifth

145. *Id.* (citing *Council of S. Mountains, Inc. v. Donovan*, 653 F.2d 573, 581 (D.C. Cir. 1981) (distinguishing the situation in *New Jersey*, 626 F.2d at 1043–45, where a statutory deadline was “insufficient to establish good cause”)). For further discussion regarding statutorily imposed deadlines see *Petry v. Block*, 737 F.2d 1193, 1201–03 (D.C. Cir. 1984).

146. 595 F.2d 207 (5th Cir. 1979).

147. *Id.* at 213 (citations omitted); see also *New Jersey*, 626 F.2d at 1042 (citing *U.S. Steel Corp.*, 595 F.2d at 213).

148. *U.S. Steel Corp.*, 595 F.2d at 213.

149. *Id.* at 214 (“This exception should be read narrowly.”).

150. 755 F.3d 702 (D.C. Cir. 2014).

151. LAWSON, *supra* note 117, at 459 (citing *Sorenson Commc’ns, Inc.*, 755 F.3d at 707).

152. See *U.S. Steel Corp.*, 595 F.2d at 214.

153. See *infra* notes 154–58.

154. 645 F.2d 1309 (8th Cir. 1981).

155. *Id.* at 1322.

Circuit considered whether the EPA properly invoked the good cause exemption to promulgate an FR regulating air quality standards for public health concerns¹⁵⁶ and “held that public health concerns, while entitled to respect, would not have been seriously jeopardized by allowing public comment.”¹⁵⁷ Therefore, for courts to find that an agency is entitled to the good cause exemption, that agency must articulate how delaying the effectiveness of a rule would jeopardize the public in some way. In other words, agencies must plead with particularization.

Agencies may not waive prepromulgation notice and comment procedures unless their use of good cause is based on a real and immediate threat to public welfare. In *American Academy of Pediatrics v. Heckler*,¹⁵⁸ the Secretary of HHS raised a good cause claim “to protect life from imminent harm.”¹⁵⁹

The Secretary argue[d] that waiver [of APA notice procedures] is appropriate because ‘any delay would leave lives at risk.’ Such an argument could as easily be used to justify immediate implementation of any sort of health or safety regulation, no matter how small the risk for the population at large or how long-standing the problem. There is no indication in this case of any dramatic change in circumstances that would constitute an emergency justifying shunting off public participation in the rulemaking.¹⁶⁰

Because the D.C. Circuit did not find the circumstances urgent, it invalidated HHS’s use of the good cause exemption.¹⁶¹

As discussed, courts evaluate agencies’ uses of the good cause exemption to determine if the agencies’ reasons for and procedures used to invoke the good cause exemption are valid. To make these determinations, courts consider a number of factors, including a rule’s timing;¹⁶² legislative and judicial mandates;¹⁶³ health and safety matters;¹⁶⁴ and public concerns.¹⁶⁵ From *Dean* to *American Academy of*

156. *U.S. Steel Corp.*, 595 F.2d at 210.

157. Ellen R. Jordan, *The Administrative Procedure Act’s Good Cause Exemption*, 36 ADMIN. L. REV. 113, 125 (1984).

158. 561 F. Supp. 395 (D.D.C. 1983).

159. *Id.* at 401 (citations omitted).

160. *Id.*

161. *Id.*

162. See *supra* text accompanying note 137.

163. See *supra* notes 140–49.

164. See *supra* notes 152–61.

165. See *supra* notes 152–56.

Pediatrics, court decisions clarify which agency rationales constitute valid good cause.¹⁶⁶ These factors and decisions will be revisited below when evaluating whether constitutional and moral harms constitute valid rationales for invoking the good cause exemption.

II. AN ILLUSTRATION: EMPLOYER PROVIDED CONTRACEPTIVE COVERAGE

A debate regarding whether or not agencies may invoke the good cause exemption for constitutional and moral harms recently ensued: On October 13, 2017, HHS, Treasury, and DOL, acting in concert, published two nearly identical IFRs in the Federal Register.¹⁶⁷ The IFRs extended religious¹⁶⁸ (i.e., constitutional) and moral¹⁶⁹ exemptions to the ACA's contraceptive coverage requirement. Under the IFRs' exemptions, certain employers and insurers that must offer group healthcare coverage were no longer required to provide contraceptive care coverage to employees.¹⁷⁰ This Part provides a brief history of the ACA's requirement that employers provide contraceptive coverage in employee health plans, including subsequent agency rulemaking and legal battles. Next, this Part discusses the Trump Administration's IFRs and the lawsuits that followed.

A. *Historical Overview: Insurance Coverage of Contraceptives*

In 2010, Congress enacted the ACA.¹⁷¹ The ACA defines employers in different categories, such as a "small employer" with one but no more than 100 employees and a "large employer" with at least 101 employees.¹⁷² The ACA "requires employers with [fifty] or more full-time employees to offer 'a group health plan or group health insurance coverage' that provides 'minimum essential coverage.'"¹⁷³ "Minimum essential coverage" includes preventive care and screenings for adults and

166. *United States v. Dean*, 604 F.3d 1275 (11th Cir. 2010); *Am. Acad. of Pediatrics v. Heckler*, 561 F. Supp. 395 (D.D.C. 1983).

167. *See* 2017 Religious IFR, *supra* note 8; 2017 Moral IFR, *supra* note 9.

168. 2017 Religious IFR, *supra* note 8, at 47,835.

169. 2017 Moral IFR, *supra* note 9, at 47,858.

170. 2017 Religious IFR, *supra* note 8, at 47,808–13; 2017 Moral IFR, *supra* note 9, at 47,861–62.

171. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified at 42 U.S.C. § 300gg-12 (2018)).

172. *Id.*

173. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 696 (2014) (citing 26 U.S.C. §§ 5000A(f)(2), 4980H(a), (c)(2) (2018)).

children.¹⁷⁴ For individuals with reproductive capacity, preventive care and screenings include “Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling, as prescribed by a health care provider.”¹⁷⁵ Employers who are statutorily required, but do not provide health insurance coverage, may be fined per day and per employee they fail to cover.¹⁷⁶

Under the ACA, however, one category of employers may seek exemptions from covering certain essential health benefits. For example, the aforementioned preventive care and screening requirements for individuals with reproductive capacity “do[] not apply to health plans sponsored by certain exempt ‘religious employers.’”¹⁷⁷ According to the ACA, religious employers like churches, non-profit hospitals, and private education institutions may obtain an exemption from sponsoring employee health plans with birth control benefits.¹⁷⁸ Employees of religious employers who seek birth control coverage may have to pay out-of-pocket or obtain independent insurance to cover related costs.¹⁷⁹

In 2011 and 2012, HHS, Treasury, and DOL published IFRs and notices of proposed rulemaking exempting employers of nonprofit organizations with religious objections to contraceptive services from providing such insurance coverage.¹⁸⁰ The 2011 IFR, titled “Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act,” amended a July 2010 IFR.¹⁸¹ The amendments responded to the July 2010 IFR’s postpromulgation comments made by religious and non-religious employers concerned with maintaining their faith and complying with the ACA’s contraceptive coverage requirements.¹⁸² As amended, the 2011

174. *Preventive Health Services*, HEALTHCARE.GOV, <https://www.healthcare.gov/coverage/preventive-care-benefits/> [https://perma.cc/TG44-KJEZ].

175. *Preventive Care Benefits for Women*, HEALTHCARE.GOV, <https://www.healthcare.gov/preventive-care-women/> [https://perma.cc/G9PK-4TX7]; *Birth Control Benefits*, HEALTHCARE.GOV, <https://www.healthcare.gov/coverage/birth-control-benefits/> [https://perma.cc/5T99-R6RA].

176. *Hobby Lobby*, 573 U.S. at 696–97.

177. *Preventive Care Benefits for Women*, *supra* note 175.

178. *Hobby Lobby*, 573 U.S. at 698–99.

179. *Id.* at 741–42.

180. *Id.* at 698 (citing 45 C.F.R. § 147.131(b) (2018)).

181. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46,621, 46,621–23 (Aug. 3, 2011) (amending Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 41,726 (July 19, 2010)).

182. *Id.* at 46,623.

IFR provided the Health Resources and Services Administration “additional discretion to exempt certain religious employers from the Guidelines where contraceptive services are concerned.”¹⁸³ The 2011 IFR also amended the 2010 rules to align with state contraceptive mandates and exemptions by defining a religious employer as an organization that: “(1) [h]as the inculcation of religious values as its purpose; (2) primarily employs persons who share its religious tenets; (3) primarily serves persons who share its religious tenets; and (4) is a non-profit organization under . . . the [Internal Revenue] Code.”¹⁸⁴

The 2012 notice of proposed rulemaking, titled “Certain Preventive Services Under the Affordable Care Act,” proposed additional amendments to ACA-related regulations regarding contraceptive coverage and religious organizations.¹⁸⁵ It stated that HHS, Treasury, and DOL were committed to developing “alternative ways of providing contraceptive coverage without cost sharing in order to accommodate non-exempt, non-profit religious organizations with religious objections to such coverage.”¹⁸⁶ The agencies’ notice indicated their hope of balancing religious employers’ objections to providing contraceptive coverage with employees’ rights to preventive healthcare coverage, including contraceptives.¹⁸⁷

Despite the interim and proposed rules exemptions for contraception coverage, many religiously affiliated employers filed lawsuits asserting their First Amendment rights against the ACA mandate.¹⁸⁸ These organizations claimed the Religious Freedom Restoration Act (RFRA)¹⁸⁹ provided a remedy to religious institutions.¹⁹⁰ In *Burwell v. Hobby Lobby*

183. *Id.*

184. *Id.* (citing I.R.C. §§ 6033(a)(1), (a)(3)(A)(i), (iii) (2018)). For more information on state contraceptive mandates and their exemptions, see Rachel VanSickle-Ward & Amanda Hollis-Brusky, *An [Un]Clear Conscience Clause: The Causes and Consequences of Statutory Ambiguity in State Contraceptive Mandates*, 38 DUKE J. HEALTH POL. POL’Y & L. 683, 683–708 (2013).

185. Certain Preventive Services Under the Affordable Care Act, 77 Fed. Reg. 16,501 (Mar. 21, 2012).

186. *Id.* at 16,503.

187. *Id.*

188. Laurie Goodstein, *Catholics File Suits on Contraceptive Coverage*, N.Y. TIMES (May 21, 2012), [https://www.nytimes.com/2012/05/22/us/catholic-groups-file-suits-on-contraceptive-coverage.html](https://www.nytimes.com/2012/05/22/us/catholic-groups-file-suits-on-contraceptive-coverage.html?mtref=www.google.com) ?mtref=www.google.com (last visited May 10, 2019).

189. Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (2018).

190. Nick Bagley, *Moral Convictions and the Contraception Exemptions*, INCIDENTAL ECONOMIST: HEALTH SERVS. RES. BLOG (June 2, 2017, 9:45 AM), <https://theincidentaleconomist.com/wordpress/moral-convictions-and-the-contraception-exemptions/> [https://perma.cc/F978-9MLA].

Stores, Inc., three closely held businesses¹⁹¹ brought an action claiming that HHS's contraceptive mandate violated their First Amendment protected religious freedom, as well as RFRA.¹⁹² The U.S. Supreme Court held that the contraceptive mandate failed RFRA's "least restrictive means of furthering that governmental interest" test.¹⁹³ In doing so, the Court found that HHS's contraceptive mandate imposed a substantial burden on employers of organizations that have religious objections to certain contraceptive methods and those employers' exercise of religion.¹⁹⁴ Employing the canon of constitutional avoidance, the Court did not consider the merits of the First Amendment claims.¹⁹⁵

In *Wheaton College v. Burwell*,¹⁹⁶ a private liberal arts college brought a similar action as in *Hobby Lobby*, against HHS.¹⁹⁷ Wheaton College challenged HHS's contraceptive mandate and petitioned the Court for injunctive relief so that it would not be obligated to provide contraceptive coverage to its employees and students.¹⁹⁸ HHS affords religious nonprofit organizations exemptions from the contraception coverage requirement if they complete certain forms.¹⁹⁹ In this case, Wheaton College's forms had not yet been approved.²⁰⁰ Like in *Hobby Lobby*, the U.S. Supreme Court reached its decision—to provide temporary injunctive relief so that Wheaton College would not be required to provide contraceptive coverage—without deciding the merits of the First Amendment claim.²⁰¹ The Court considered another analogous claim against HHS's contraceptive mandate in *Zubik v. Burwell*.²⁰² In *Zubik*, the Court explicitly embraced the canon of constitutional avoidance by dodging the merits of the case: "the Court does not decide whether petitioners' religious exercise has been substantially burdened."²⁰³

191. A closely held business is "[a] corporation whose stock is not freely traded and is held by only a few shareholders (often within the same family)." *Close Corporation*, BLACK'S LAW DICTIONARY 416 (10th ed. 2014).

192. *Hobby Lobby*, 573 U.S. at 701–702.

193. *Id.* at 688, 694, 727–32 (citations omitted).

194. *Id.* at 725–26.

195. *Id.* at 735–36.

196. 573 U.S. 958 (2014).

197. *Id.*

198. *Id.* at 958–59.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Zubik v. Burwell*, 578 U.S. ___, 136 S. Ct. 1557 (2016).

203. *Id.* at 1560.

Under the President Barack H. Obama Administration, HHS invoked the good cause exemption to comply with the Court's *Wheaton College* order.²⁰⁴ Essentially, the Court's order necessitated a rule change. As administrative law expert and University of Michigan Professor of Law Nick Bagley notes, court orders are "classic reasons to find good cause" actions valid.²⁰⁵ "Indeed, that's why the D.C. Circuit brushed back an earlier challenge to one of HHS's interim final rules: 'the modifications made in the interim final regulations are minor, meant only to "augment current regulations in light of the Supreme Court's . . . order.'""²⁰⁶ As mentioned in Section I.C, the good cause exemption is generally appropriate when it is used to comply with court orders.

B. Friday the Thirteenth: The Trump Administration's Publication of IFRs

On Friday, October 13, 2017, the Trump Administration's HHS, Treasury, and DOL published two nearly identical IFRs in the Federal Register. The "Religious Exemptions and Accommodations for Coverage of Certain Preventive Services under the Affordable Care Act"²⁰⁷ and "Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act"²⁰⁸ provided religious and moral exemptions and accommodations to employers who provided healthcare coverage under the ACA. The IFRs allowed employers to claim an exemption in order to deny employees coverage for contraceptives and other preventive health services.²⁰⁹ The IFRs' language was much broader than the exemptions already established in the ACA²¹⁰ and the IFRs promulgated by the Obama Administration.²¹¹ Unlike the Obama Administration's IFRs, which invoked the good cause exemption to comply with the U.S. Supreme Court's ruling in *Wheaton*

204. Bagley, *supra* note 135 (discussing *Wheaton College*, 573 U.S. 958; Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870 (July 2, 2013); Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 41,726 (July 19, 2010)); *see also* Util. Solid Waste Activities Group v. EPA, 236 F.3d 749 (D.C. Cir. 2001).

205. Bagley, *supra* note 135.

206. *Id.*

207. 2017 Religious IFR, *supra* note 8.

208. 2017 Moral IFR, *supra* note 9.

209. *Id.*; 2017 Religious IFR, *supra* note 8.

210. *Preventive Care Benefits for Women*, *supra* note 175.

211. Certain Preventive Services Under the Affordable Care Act, *supra* note 185, at 16,503; Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, *supra* note 181, at 46,622.

College order,²¹² the Trump Administration’s agencies argued that the ACA’s contraceptive mandate caused religious and moral harms to certain employers, justifying its use of the good cause exemption.²¹³

Generally, religion is defined as “[a] system of faith and worship . . . containing a moral or ethical code; esp., such a system recognized and practiced by a particular church, sect, or denomination. [C]ourts have interpreted the term *religion* broadly to include a wide variety of theistic and nontheistic beliefs.”²¹⁴ The Trump Administration’s agencies asserted many rationales for promulgating the 2017 Religious IFR. First, the agencies claimed that many religious organizations could not afford to litigate to obtain the injunctive relief secured by *Hobby Lobby*.²¹⁵ Second, the agencies stated that religious organizations suffered by complying with the ACA.²¹⁶ Third, the agencies reasoned that invoking the good cause exemption was necessary to provide certain employers with immediate relief and to clarify uncertainties.²¹⁷ Fourth, the agencies stated that in some instances the contraceptive coverage requirements “could serve as a deterrent for citizens who might consider forming new entities.”²¹⁸ To prove that invoking the good cause exemption was necessary, the agencies cited RFRA, various legal battles, and disparate impact concerns as evidence.²¹⁹ The 2017 Religious IFR made the ACA’s religious exemption available to any church or religious order, nonprofit organization, closely held organization, for-profit entity that is not closely held, non-governmental employer, institution of higher education, and health insurance issuer.²²⁰

The 2017 Moral IFR relied on a moral harm rationale for invoking the good cause exemption.²²¹ The moral exemption was much broader than the religious exemption. The term “moral” is defined by Merriam-Webster as, “of or relating to principles of right and wrong in behavior,” “expressing or teaching a conception of right behavior,” “conforming to a standard of right behavior,” “sanctioned by or operative on one’s

212. See *supra* note 204.

213. 2017 Religious IFR, *supra* note 8; 2017 Moral IFR, *supra* note 9.

214. *Religion*, BLACK’S LAW DICTIONARY 1482 (10th ed. 2014).

215. 2017 Religious IFR, *supra* note 8.

216. *Id.*

217. *Id.*

218. *Id.* at 47,814.

219. *Id.* at 47,798–801 (citing *Zubik v. Burwell*, 578 U.S. ___, 136 S. Ct. 1557 (2016); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014)).

220. 2017 Religious IFR, *supra* note 8.

221. 2017 Moral IFR, *supra* note 9.

conscience or ethical judgment,” etc.²²² In the 2017 Moral IFR, the agencies reasoned that while religious objectors were exempt from providing contraceptive coverage, neither the ACA nor past IFRs “offer[ed] an exemption or accommodation to any group possessing non-religious moral objections to providing coverage for some or all contraceptives.”²²³ The 2017 Moral IFR’s statement of basis and purpose focuses on “individuals and entities with sincerely held moral convictions.”²²⁴ However, the actual language of the IFR does not explicitly define “moral convictions.”²²⁵ Instead, it provides blanket exemptions to any nonprofit organization and some for-profit organizations, such as universities and health insurers, that morally object to contraceptive coverage.²²⁶ The exemption is written as

(2) The exemption of this paragraph (a) will apply to the extent that an entity . . . objects to its establishing, maintaining, providing, offering, or arranging (as applicable) coverage or payments for some or all contraceptive services, or for a plan, issuer, or third party administrator that provides or arranges such coverage or payments, based on its sincerely held moral convictions.²²⁷

Moral conviction is defined broadly, and the term “coverage or payments” could be construed to mean that a person who morally objects to paying insurance coverage in general—rather than specifically objects to contraceptives—would also be exempt from providing such coverage. The inherent ambiguity and broadness of the term “moral” can be applied to many situations (i.e., euthanasia, abortion, gun control, mass incarceration, environmental protection), thus leaving room for further manipulation.

While courts²²⁸ did not decide the validity of the agencies’ religious and moral harms claims, courts did permit lawsuits against the Trump

222. *Moral*, MERRIAM-WEBSTER DICTIONARY (2018), <https://www.merriam-webster.com/dictionary/moral> [https://perma.cc/XK3T-TNL3].

223. 2017 Moral IFR, *supra* note 9, at 47,839.

224. *Id.*

225. *Id.* (discussing the difference between “religious beliefs” and “moral convictions,” but not defining either).

226. *Id.* at 47,862.

227. *Id.*

228. There were a number of additional cases—utilizing various arguments against the IFRs—pending, including cases brought by states (e.g., Massachusetts, Pennsylvania, and Washington) and by nonprofit organizations (e.g., ACLU). *See, e.g.,* Massachusetts v. HHS, 301 F. Supp. 3d 248 (D. Mass. 2018) (granting defendants’ motion for summary judgment for lack of standing; currently on appeal to the First Circuit). While this Comment acknowledges the many constitutional, statutory,

Administration to move forward and, then, resolve those suits on other grounds.²²⁹ The continuance of these lawsuits means that courts generally found that the plaintiffs had standing, the issue was ripe for judicial consideration, and the plaintiffs met the preliminary injunction analysis by demonstrating their claims are likely to succeed. For example, in *California v. HHS*,²³⁰ the U.S. District Court for the Northern District of California held that California had Article III and statutory standing to challenge the 2017 Religious and Moral IFRs when the court issued a preliminary injunction on December 21, 2017.²³¹ However, in *California v. Azar*,²³² the Ninth Circuit held that the injunction should be limited to the plaintiff states, rather than nationwide.²³³ The *HHS* Court found that the economic costs associated with “ensuring that women have access to no-cost contraceptive coverage” and interest in the “physical health and well-being of their citizens” satisfied Article III’s standing inquiry.²³⁴ California met the APA’s standing requirements, expressed in 5 U.S.C. § 702, because the IFRs operated as a final agency action that negatively impacted its citizens.²³⁵

On November 15, 2018, the Trump Administration issued two FRs, solidifying the 2017 IFRs.²³⁶ Ironically, the publication of the 2017 IFRs and their postpromulgation comment period, satisfied the agencies’ notice and comment requirements for the 2018 FRs.²³⁷ Substantively, the 2018

and common law claims involved in these cases, it focuses on courts’ treatment of the APA’s good cause exemption for religious and moral harms.

229. *See, e.g., California v. HHS*, 281 F. Supp. 3d 806 (N.D. Cal. 2017) (holding that the plaintiff states had standing to sue), *aff’d in part, California v. Azar*, 911 F.3d 558, 570–73 (9th Cir. 2018).

230. 281 F. Supp. 3d 806 (N.D. Cal. 2017).

231. *Id.* at 822–23.

232. 911 F.3d 558 (9th Cir. 2018) (originally filed as *California v. Wright*, No. 4:17-cv-05789 (N.D. Cal. Oct. 6, 2017)).

233. *Azar*, 911 F.3d at 584.

234. *HHS*, 281 F. Supp. 3d at 822.

235. *Id.* at 822–23.

236. *See* Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57,536 (Nov. 15, 2018) (codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, 45 C.F.R. pt. 147); Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57,592 (Nov. 15, 2018) (codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, 45 C.F.R. pt. 147) [collectively hereinafter 2018 FRs].

237. Professor Nicholas Bagley explains:

Are the [final] rules legal? Procedurally, HHS is on safer ground now that it’s walked through notice and comment. To be sure, the courts are sometimes nervous when agencies issue interim final rules and purport to conduct notice and comment after the fact. If a rule has already gone into effect, the courts ask, isn’t the notice-and-comment process a farce? Does the agency, at that stage, really have an open mind about the comments it receives?

Those concerns will certainly be in play here. Oddly enough, though, the fact that the courts put the initial rules on hold will play into the Trump administration’s hands. Because the interim

FRs were nearly identical to the 2017 IFRs.²³⁸ The states that participated in *Azar*, plus a few additional states, immediately challenged the FRs.²³⁹ The 2018 FRs were the impetus for the *Azar* Court to, once again, question whether states had standing to sue HHS, Treasury, and DOL. On December 13, 2018, the *Azar* Court reached a partial decision,²⁴⁰ holding that the states had standing to sue²⁴¹ and the controversies surrounding the IFRs would not be moot until the FRs' January 14 effective date.²⁴² In other words, as soon as the 2018 FRs became effective on January 14, 2019, pending litigation surrounding the 2017 IFRs became moot because there was no longer a "live controversy."²⁴³ Turning to the question of whether the agencies validly invoked the good cause exemption, the *Azar* Court considered the agencies' claims that they had good cause to bypass standard procedures to (1) make rules effective immediately; (2) relieve burdened organizations with religious and moral beliefs; and (3) decrease insurance costs for organizations with religious and moral beliefs.²⁴⁴ Without generally addressing religious and moral harms, the court found that none of these three claims were valid.²⁴⁵

The night before the 2018 FRs became effective, the U.S. District Court for the Northern District of California granted plaintiff states an injunction, finding the states were likely to succeed in their arguments against both the 2018 Religious and Moral FRs.²⁴⁶ On remand, the district court noted that generally "the courts, not the agencies, are the arbiters of what the law and the Constitution requires."²⁴⁷ The court also explained that the plaintiff states were likely to succeed "in their argument that the Moral Exemption is not in accordance with the ACA" and they were

final rules weren't allowed to take effect, they acted in practice like proposed rules. And there's nothing anomalous about taking notice and comment on proposed rules.

Nicholas Bagley, *The Trump Administration Targets the Contraception Mandate*, INCIDENTAL ECONOMIST (Nov. 9, 2018, 8:00 AM), <https://theincidentaleconomist.com/wordpress/the-trump-administration-targets-the-contraception-mandate/> [<https://perma.cc/3TYU-Y7YF>].

238. *California v. HHS*, 351 F. Supp. 3d 1267, 1279 (N.D. Cal. 2019).

239. *Compare California v. Azar*, 911 F.3d 558, 584 (9th Cir. 2018) (California, Delaware, Maryland, New York, and Virginia), with *HHS*, 351 F. Supp. 3d at 1280 (California, Connecticut, Delaware, Hawaii, Illinois, Maryland, Minnesota, New York, North Carolina, Rhode Island, Vermont, Virginia, Washington, and District of Columbia).

240. *Azar*, 911 F.3d at 566.

241. *Id.* at 570.

242. *Id.* at 568–69.

243. *Id.* at 569.

244. *Id.* at 576–78.

245. *Id.* at 578.

246. *California v. HHS*, 351 F.3d 1267, 1298–99 (N.D. Cal. 2019).

247. *Id.* at 1293.

“likely to suffer irreparable harm unless the Final Rules are enjoined to maintain the status quo pending resolution of the case on the merits.”²⁴⁸

Notwithstanding these developments, neither court definitively addressed whether litigants could successfully argue that religious or moral harms are invalid reasons for invoking the APA’s good cause exemption. In other words, whether administrative agencies can rely on a constitutional issue, such as religious freedom, or a broad ethical issue, such as moralism, to invoke the good cause exemption remains an open question.

The 2017 IFRs and 2018 IFRs illustrate how the Trump Administration used constitutional and moral harms to bypass notice and comment rulemaking.²⁴⁹ Part III discusses whether administrative agencies may validly rely on constitutional or moral harms to invoke the good cause exemption. This Comment ultimately concludes that constitutional and moral harms are invalid reasons to invoke the good cause exemption.

III. INVALID HARMS

As discussed in Part I, when determining the validity of an agency’s good cause exemption, courts will review the agency’s “finding and a brief statement of reasons” for issuing a rule.²⁵⁰ These statements must adequately explain why the traditional use of notice and comment procedures is “impracticable, unnecessary, or contrary to the public interest.”²⁵¹ Using the Trump Administration’s 2017 IFRs as an example, this Part argues that constitutional and moral objections are invalid rationales for invoking the APA’s good cause exemption.

A. *Capricious Constitutional Objection*

As discussed in Section II.B, litigation against the Trump Administration called into question the validity of its religious objection rationale for promulgating its 2017 Religious IFR without going through notice and comment.²⁵² At the center of the Trump Administration’s religious objection rule was a First Amendment argument regarding employers’ religious freedom. This Section discusses the various ways rules invoking good cause for constitutional claims are invalid, as well as unnecessary, arbitrary, and capricious.

248. *Id.* at 1296–97.

249. *See supra* Section II.B.

250. 5 U.S.C. § 553(b)(3)(B) (2018).

251. *Id.*

252. *Supra* Section II.B (referencing *California v. Azar*, 911 F.3d 558, 567 (9th Cir. 2018)).

First, many constitutional issues are resolved through litigation. After a constitutional claim is resolved in court, it would be unnecessary for an agency to invoke the good cause exemption to publish a rule advancing the same (i.e., the resolved) constitutional claim. However, this previous litigation argument could cut the other way. Courts have found good cause valid after litigation on the matter because public comment would *not* have provided new information.²⁵³ When good cause is valid after litigation on a constitutional matter, however, the use of the good cause hinges on the litigation or court order, rather than the constitutional matter alone.²⁵⁴

The 2017 Religious IFR provides an example of why administrative agencies should not invoke the good cause exemption to promulgate a rule if the harm the rule claims to remedy has already been litigated and resolved. The content of the 2017 Religious IFR was similar to the Obama Administration's rule amendments, as well as the U.S. Supreme Court's rulings in *Hobby Lobby*, *Wheaton College*, and *Zubik*. By offering employers with religious objections an exemption to the contraceptive mandate, the 2017 Religious IFR was redundant.²⁵⁵ Because exemptions for employers with religious objections were provided through past rulemaking and litigation, the 2017 Religious IFR did not remedy an immediate risk of harm. Without a particularized and imminent harm, the 2017 Religious IFR was arbitrary.

California v. HHS demonstrates this line of reasoning. The *HHS* Court found that the Trump Administration's claims would likely fail on the merits.²⁵⁶ Specifically, a court would likely find the Trump Administration's contention that individuals are experiencing hardship waiting on pending RFRA lawsuits and "choos[ing] between the Mandate, accommodation, or penalties for [noncompliance]" were inefficient justifications for forgoing notice and comment rulemaking.²⁵⁷ Regardless of the 2017 Religious IFR, employers maintained the ability to file litigation to protect their First Amendment or RFRA rights, as well as to

253. See, e.g., *EME Homer City Generation, L.P. v. EPA*, 795 F.3d 118, 134–35 (D.C. Cir. 2015) (finding that the EPA validly invoked the good cause exemption to correct a previously, improperly invoked rule because "commentators could not have said anything during a notice and comment period that would have changed that fact." In other words, a comment period would be unnecessary).

254. See *supra* notes 71, 80–82.

255. *Zubik v. Burwell*, 578 U.S. ___, 136 S. Ct. 1557 (2016); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014); *Wheaton College v. Burwell*, 573 U.S. 958 (2014).

256. *California v. HHS*, 281 F. Supp. 3d 806, 832 (N.D. Cal. 2017).

257. *Id.* at 827 (alteration in original).

file for a waiver from providing contraceptive coverage with HHS.²⁵⁸ Because employers with closely held religious beliefs were already protected and exempt from providing contraceptive benefits to their employees,²⁵⁹ there was no immediate threat to the employers' wellbeing. Without an immediate harm, the 2017 Religious IFR lacked a justification to bypass notice and comment rulemaking.

Additionally, previous litigation and subsequent corrective agency action under the Obama Administration²⁶⁰ resolved the Trump Administration's concerns.²⁶¹ The Obama Administration provided religious organizations exemptions from the ACA's contraceptive mandates.²⁶² Since the 2016 *Zubik* ruling, neither Congress nor an agency has enacted legislation or a rule that would substantially change the requirements of a religious institution to provide contraceptive coverage. Due to the fact that there were no changed circumstances—the public had not been subjected to a new, immediate, or greater harm—a court would have likely found that the 2017 IFRs were unnecessary.

Omnipoint and the 2017 Religious IFR are both examples of agency rules that were not issued to comply with a court order—despite the 2017 Religious IFR's constitutional underpinnings.²⁶³ Since many IFRs are promulgated to comply with court orders or statutory mandates,²⁶⁴ it is odd that the 2017 Religious IFR was not a logical result of compliance with either a court order or statutory mandate. Unless a court order or a statute mandates that the agency promulgate a new rule, previously litigated or legislated constitutional issues moot the need to issue a rule without notice and comment.²⁶⁵ Without a mandate or other particularized rationale, it is arbitrary and capricious for an agency to promulgate a rule bypassing notice and comment procedures.²⁶⁶

Second, constitutional issues are for Congress or courts to determine.²⁶⁷ As discussed in Section I.C, the judiciary avoids making decisions on

258. *California v. HHS*, 351 F. Supp. 3d 1267, 1277 (N.D. Cal. 2019) (order granting preliminary injunction).

259. *Hobby Lobby*, 573 U.S. 682; see also *supra* Section II.A.

260. See *supra* Section II.A.

261. See *supra* Section II.B.

262. Certain Preventive Services Under the Affordable Care Act, *supra* note 185, at 16,503.

263. *Omnipoint Corp. v. FCC*, 78 F.3d 620 (D.C. Cir. 1996); see 2017 Religious IFR, *supra* note 8.

264. See *supra* Section I.B.

265. See *supra* Sections I.B, I.C.

266. See *supra* Sections I.B, I.C.

267. See *supra* Sections I.B, I.C.

constitutional issues.²⁶⁸ Given the structure of the three branches of government, the executive branch is responsible for leading and carrying out the laws, the judiciary is responsible for ensuring the laws are being carried out faithfully and adequately, and the legislature is responsible for drafting and expanding laws.²⁶⁹ Because Congress is the only body with the ability to proactively amend the U.S. Constitution, it should be the main constitutional speaker.²⁷⁰ Administrative agencies should take a chapter out of the judiciary's playbook and also engage in constitutional avoidance.

To demonstrate, consider the various tactics that the *Azar* Court did or could have done to avoid the 2017 Religious IFR's constitutional issue:

- The court could have avoided addressing the constitutional issue by invalidating the 2017 Religious IFR for procedural deficiencies.
- The court could have avoided the constitutional issue by claiming Congress is in a better position to enact laws than the Judiciary or Executive (via administrative agencies). For example, the court could have found that Congress spoke to the issue of religious exemptions for contraceptives when it enacted the ACA.²⁷¹ In fact, the ACA initially granted religious employers like churches, non-profit hospitals, and private education institutions an exemption from sponsoring employee health plans with contraceptive benefits.²⁷² Because Congress addressed the issue of religious exemptions when it enacted the ACA, the 2017 Religious IFR would be considered arbitrary and capricious. Additionally, Congress maintains the ability to broaden or narrow the ACA's religious exemption. Applying this rationale to similar agency actions, courts should determine that Congress, rather than the Judiciary or Executive, are better equipped to effectuate the public will.²⁷³
- The court could have avoided ruling on constitutional grounds by claiming the constitutional harm addressed by the 2017 Religious IFR was previously litigated and resolved by *Hobby Lobby*, *Wheaton College*, and *Zubik*, and the Obama

268. *See supra* Section I.C.

269. U.S. CONST. arts. I–III.

270. U.S. CONST. art. II, § 1.

271. I.R.C. § 5000A(d)(2) (2018).

272. *Id.* § 1402(g).

273. *Supra* Sections I.B, I.C.

Administration's IFRs.²⁷⁴ The court could have argued that this precedent resolved the constitutional issue, rendering the 2017 Religious IFR unnecessary, arbitrary, and capricious.

Even when courts engage a constitutional issue, they tend to argue that the constitutional issue is best left for Congress, rather than an agency or court to resolve. This comes back to the principles of separation of powers and the judiciary's goal of maintaining peace between itself and the Legislative and Executive branches.²⁷⁵ Thus, to dodge constitutional issues, courts are likely to (1) focus on the IFR's procedural flaws; (2) argue Congress is in a better position to enact laws than the Judiciary; or (3) claim that since the constitutional issue was previously litigated and resolved, the IFR is unnecessary, arbitrary, and capricious.²⁷⁶

Third, constitutional issues are broad and have the potential to impact large swaths of Americans. For that reason, constitutional issues are of great importance to the American public and should require notice and the opportunity to comment. With the time constraints and costs of rulemaking,²⁷⁷ constitutional issues should be left to Congress. Unless an agency takes the time to employ proper notice and comment procedures, Congress will arguably be more representative than agencies and impose more checks and balances than agencies.

B. Misguided Moral Objection

Congress, federal courts, and commentators have expressed concerns that agencies may abuse the good cause exemption.²⁷⁸ This is a concern that the good cause exemption and the administrative agency's political leanings will overcome public participation.²⁷⁹ Political abuse is apparent when agencies use the good cause exemption on hot-topic or political issues,²⁸⁰ such as contraceptive coverage,²⁸¹ to bypass the lengthy notice and comment rulemaking procedures. This abuse is also evident when the good cause exemption hinges on broad and subjective reasoning,²⁸² such

274. *Supra* note 255.

275. *Supra* Section II.C.2.

276. *See supra* note 253.

277. *See supra* Part I.

278. *See supra* Part I.

279. O'Connell, *supra* note 31, at 910–11.

280. *Id.*

281. For up-to-date news regarding contraceptive coverage see *Contraception and Insurance Coverage (Religious Exemption Debate)*, N.Y. TIMES, <https://www.nytimes.com/topic/subject/contraception-and-insurance-coverage> (last visited May 10, 2019).

282. *See supra* Section II.B.

as a moral objection. This Section discusses the various ways rules invoking good cause for moral objections are invalid.

As discussed in Part I, the very nature of the good cause exemption is already broad and subject to agency abuse. The availability of the good cause exemption as a method for agencies to bypass the traditional notice and comment procedures is one that Congress intended to be used sparingly and in times of emergency.²⁸³ Courts have affirmed this specific instance of congressional intent—or more accurately, courts have affirmed congressional avoidance of the term moral—in numerous cases.²⁸⁴ For example, in *American Academy of Pediatrics v. Heckler*, the D.C. Circuit found an interim rule dealing with moral and ethical concerns to be arbitrary and capricious because “had Congress intended [§ 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794] to reach so far into such a sensitive area of moral and ethical concerns it would have given some evidence of that intent.”²⁸⁵ The Court believed that the decision to clarify and amend the Rehabilitation Act to address moral concerns was Congress’s,²⁸⁶ noting that Congress may clarify and amend a statute if intended to cover moral and ethical concerns.²⁸⁷ Additionally, while one Congress member mentioned the word “moral” in discussions regarding amending § 553, the term “moral” was excluded from the APA.²⁸⁸ In addition to leaving out the term “moral” in the APA, Congress avoided its use in HHS-related statutes, such as the Rehabilitation Act of 1973.²⁸⁹

Viewing the 2017 Moral IFR as an example, the *HHS* Court addressed and dismissed the Trump Administration’s moral harm rationale.²⁹⁰ The court noted that the moral objection “markedly expanded the scope of the exemption available to religious entities under the ACA’s contraceptive coverage mandate, and created an entirely new exemption based on moral objections.”²⁹¹ The moral exemption to the ACA’s contraceptive mandate

283. See, e.g., *U.S. Steel Corp. v. EPA*, 595 F.2d 207, 214–15 (5th Cir. 1979) (holding that the EPA “failed to show [a] strong enough reason to invoke the § 553(b)(B) exception” and that the “exception should be read narrowly”; reasoning that if the court were to accept the EPA’s reasoning, it would “make the provisions of § 553 virtually unenforceable”).

284. See *supra* Section II.B.

285. *Am. Acad. of Pediatrics v. Heckler*, 561 F. Supp. 395, 402 (D.D.C. 1983).

286. *Id.*

287. *Id.*

288. Lavilla, *supra* note 20, at 324 n.29.

289. See *Am. Acad. of Pediatrics*, 561 F. Supp. at 402.

290. *California v. HHS*, 281 F.3d 806 (N.D. Cal. 2017).

291. *Id.* at 813.

broadens the scope of the ACA so greatly that notice and comment procedures were warranted.²⁹²

The broad scope of the moral objection would have caused the 2017 IFRs to be arbitrary and capricious. In addition to providing employers exemptions, the IFRs permitted health insurance companies to utilize these exemptions.²⁹³ Therefore, insurance companies owned or managed by individuals with religious or moral objections to providing group health insurance coverage of contraceptives and other preventive care could have obtained an exemption from doing so.²⁹⁴ With employers and insurance companies opting-out of providing contraceptive coverage, individuals' access to contraceptives and preventive health care would be severely limited. This limitation conflicted with the ACA's goal of making comprehensive and "affordable health insurance available to more people."²⁹⁵

Additionally, like in *American Academy of Pediatrics*, a court could find that, when the ACA was enacted and subsequently amended, Congress had the opportunity to include a moral exemption. Congress could have and, in the future, may broaden or narrow the ACA's exemptions. Because Congress addressed the issue of contraceptive coverage, the Trump Administration's decision to promulgate the 2017 IFRs was arbitrary and capricious.

The broad and subjective nature of the term "moral" may be why, until the Trump Administration, agencies had not relied on a moral claim. In a legal sense, moral typically refers to "the study . . . of human conduct, of right and wrong behavior."²⁹⁶ The broad scope of what constitutes a moral objection opens the door to agency—and in the case of the 2017 IFRs, possibly employer—abuse. And, one could argue that such a broad harm likely fails *New Jersey's* requirement that harms be real and demonstrable.²⁹⁷ Thus, while a moral harm may seem like a novel way to avoid notice and comment rulemaking, it should be an invalid use of the good cause exemption. Just as Congress has the power to amend the ACA, it also has the power to amend § 553 of the APA to specify what

292. *Id.*

293. 2017 Religious IFR, *supra* note 8; 2017 Moral IFR, *supra* note 9.

294. 2017 Religious IFR, *supra* note 8; 2017 Moral IFR, *supra* note 9.

295. *Affordable Care Act*, HEALTHCARE.GOV, <https://www.healthcare.gov/glossary/affordable-care-act/> [<https://perma.cc/3R6S-MU3M>].

296. *Moral*, BLACK'S LAW DICTIONARY 1162 (10th ed. 2014).

297. *N.J. Dep't of Env'tl. Prot. v. EPA*, 626 F.2d 1038, 1046 (D.C. Cir. 1980) (citing S. DOC. NO. 79-248, at 200 (1946)).

constitutes good cause.²⁹⁸ Essentially, Congress's power to amend the good cause exemption acts as a check on administrative agencies. If agencies continue to improperly rely on moral harms to invoke the good cause exemption,²⁹⁹ Congress should amend the APA; reminding the agencies that when an emergency exit door is opened an alarm bell rings.

C. Two Objections are Not Better than One

When two identical IFRs are published in the Federal Register—regardless of the validity of the individual rules—courts should be skeptical. Courts should be concerned that the publication of two nearly identical rules are (1) unnecessary, arbitrary, and capricious; (2) a political ploy to avoid the traditional and lengthy notice and comment rulemaking; or (3) both. Using the 2017 IFRs as an illustration, this Section explores two reasons courts should find that an agency cannot validly rely on the good cause exemption to publish multiple nearly identical IFRs.

First, courts should find that two nearly identical rules are unnecessary, arbitrary, and capricious. Considered together, the 2017 Religious and Moral IFRs were redundant. This redundancy would have rendered the 2017 IFRs unnecessary, arbitrary, and capricious. For instance, the broad scope of the 2017 Moral IFR may have covered the 2017 Religious IFR and vice versa. In other words, the agencies could have reached the same aims and results by promulgating one instead of two IFRs.

The dictionary definitions, referenced in Part II,³⁰⁰ help explain how the 2017 Moral IFR makes the 2017 Religious IFR redundant: Moral is defined as “of or relating to principles of right and wrong in behavior,” “expressing or teaching a conception of right behavior,” “sanctioned by or operative on one’s conscience or ethical judgment,” etc.³⁰¹ Religion is defined as “[a] system of faith and worship . . . containing a moral or ethical code [C]ourts have interpreted the term *religion* broadly to include a wide variety of theistic and nontheistic beliefs.”³⁰² Because the definition of religion contains the phrase “a moral or ethical code”³⁰³ in some instances, it may cover moral beliefs and vice versa. Similarly, because the definition of moral contains “ethical judgment,” in some

298. See *supra* Section I.A.

299. See *supra* Section II.B.

300. See *supra* Section II.B.

301. *Moral*, MERRIAM-WEBSTER DICTIONARY (2018), <https://www.merriam-webster.com/dictionary/moral> [https://perma.cc/XK3T-TNL3].

302. *Religion*, BLACK’S LAW DICTIONARY 1482 (10th ed. 2014).

303. *Id.*

instances, it may cover religion's "theistic and nontheistic beliefs" and vice versa.

Given these definitions, an individual with a religious objection to contraceptive coverage may have achieved the same result by relying on the 2017 Moral IFR, and an individual with a moral objection to contraceptive coverage may have achieved the same aim by relying on the 2017 Religious IFR. When either one of the 2017 IFRs was promulgated, it eliminated, or at least relieved, the emergency situation that the agencies relied on to invoke the good cause exemption and promulgate the other 2017 IFR. Therefore, as soon as one of the 2017 IFRs was published, the other IFR became redundant, unnecessary, and arbitrary. Courts should look skeptically at two nearly identical rules, like the 2017 IFRs, to determine whether there is an emergency warranting the double use of the notice and comment exemption and whether the that double use is necessary.

Second, when faced with two nearly identical rules, courts should ask: Did the agency publish these rules as a political maneuver? And, was it the agency's goal to avoid the lengthy notice and comment rulemaking procedures? To answer these questions, courts must look at the rules' substance, procedures, and context. An agency could publish two nearly identical rules as a form of insurance: if a court invalidates one rule—on substantive or procedural grounds—the agency may still enforce the other rule. In other words, duplicative rules could be deployed on newsworthy topics in anticipation of litigation. Using the 2017 IFRs as an illustration, HHS, Treasury, and DOL may have reasoned that if the 2017 Religious IFR was invalidated, the 2017 Moral IFR could remain in place. If that were the case, because the 2017 Moral IFR was broad enough to capture the same aim as the 2017 Religious IFR, the agency would still have achieved its initial goal. The strategy of publishing two rules in anticipation of litigation would impermissibly allow agencies to escape the participatory notice and comment rulemaking requirements. Thus, courts should invalidate rules employed using this type of agency action.

Similarly, courts may review the context in which an agency published two nearly identical rules and find that the agency published them to avoid a lengthily notice and comment period because the rules touch on a politically contested issue. Using the 2017 IFRs as an illustration, a court could look at the rules' context and conclude that the agencies published them as political tools to restrict access to contraceptives and other preventive health services while escaping public discourse via a notice and comment period. As the Ninth Circuit noted when granting plaintiff

states injunctive relief in *California v. Azar*,³⁰⁴ courts should find that the agencies impermissibly used the 2017 Religious and Moral IFRs to escape notice and comment rulemaking.³⁰⁵ When courts find that an agency improperly relied on the good cause exemption to escape notice and comment rulemaking for political reasons, they must void the rule.³⁰⁶ When two duplicative rules are at issue, courts should consider voiding both rules.

In sum, two nearly identical rules are not better than one rule. Courts should find nearly identical rules redundant and therefore unnecessary, arbitrary, and capricious. Additionally, when agencies publish two nearly identical rules, courts should be skeptical of their use as a political ploy to avoid the notice and comment rulemaking.

CONCLUSION

Constitutional and moral harms are invalid reasons for invoking the APA's good cause exemption to notice and comment rulemaking. The Trump Administration's 2017 interim final rules—which broadened contraceptive coverage exemptions for employers with religious and moral objections—provide an illustration.

The 2017 IFRs invalidly relied on the APA's good cause exemption to the time-consuming, but more democratic, notice and comment rulemaking procedures. First, past legislation, litigation, and agency rulemaking resolved the First Amendment issues the agencies relied on to promulgate the 2017 Religious IFR. Without changed circumstances, the 2017 Religious IFR was unnecessary because the public had not been subjected to a new, immediate, or greater harm. Second, the 2017 Moral IFR was overly broad and impermissibly expanded the good cause exemption from its purpose as a “safety valve” to an “escape hatch.” Third, the publication of two nearly identical IFRs was redundant, unnecessary, and arbitrary. The publication of the 2017 Moral IFR eliminated the emergency situation that the agencies relied on to invoke good cause and promulgate the 2017 Religious IFR. In general, when agencies publish nearly identical rules, courts should review those rules skeptically to ensure the rules are not being used to escape notice and comment rulemaking procedures.

The use of constitutional and moral objections will broaden administrative agencies' ability to bypass notice and comment rulemaking

304. 911 F.3d 558 (9th Cir. 2018); *see supra* Section II.B.

305. *See* N.J. Dep't of Env'tl. Prot. v. EPA, 626 F.2d 1038, 1046 (D.C. Cir. 1980) (citations omitted).

306. *See id.*

proceedings and delegitimize the rulemaking process. Repeated use of constitutional and moral objections to invoke the good cause exemption will endanger the participatory government principles that Congress proscribed when it promulgated the APA's notice and comment rulemaking requirements. In sum, administrative agencies should not rely on constitutional or moral harms to invoke the good cause exemption. And, if agencies do rely on them, Congress and the courts should remind the agencies that when they open an emergency exit door, an alarm bell rings.